UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case. No. 21-137 (RC)**
	)	
BRIAN GUNDERSEN	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

Pursuant to 18 U.S.C. §§ 3141(b) and 3143(b) and Fed. R. Crim. P. 46(c) & 38(b)(1), Defendant Brian Gundersen respectfully moves this Court for release pending appeal. Mr. Gundersen satisfies the criteria for release because he poses no flight or safety risk, his appeal is not for the purpose of delay, and his appeal raises a substantial question of law that, if decided in his favor, would likely result in a reduced imprisonment sentence that would expire before his appeal concludes. In particular, a substantial question exists as to whether the statute underlying Mr. Gundersen's primary felony conviction, 18 U.S.C. § 1512(c)(2), applies to his conduct on January 6, 2021, in light of the Supreme Court's recent decision to grant certiorari in *United States v. Fischer,* No. 23-5572, 2023 WL 8605748 (Dec. 13, 2023).

Background

On January 25, 2021, Mr. Gundersen was charged by complaint with four misdemeanor counts relating to the breach of the U.S. Capitol on January 6, 2021.

On February 9, 2021, an information was filed as to those counts. On March 5, 2021, a superseding indictment was filed charging Mr. Gundersen with five counts: Obstruction of an Official Proceeding and Aiding and Abetting under 18 U.S.C. § 1512(c)(2) (Count One), Entering and Remaining in a Restricted Building or Grounds under 18 U.S.C. § 1752(a)(1) (Count Two), Disorderly and Disruptive Conduct in a Restricted Building or Grounds under 18 U.S.C. § 1752(2) (Count Three), Disorderly Conduct in a Capitol Building under 18 U.S.C. § 5104(e)(2)(D) (Count Four), and Parading, Demonstrating, or Picketing in a Capitol Building under 18 U.S.C. § 5104(e)(2)(G) (Count Five). On May 26, 2021, the government filed a Second Superseding Indictment, adding the charge of Assaulting, Resisting or Impeding Certain Officers, in violation of 18 U.S.C. §111(a)(1).

On September 19, 2022, Judge Thomas Hogan denied Mr. Gundersen's Motion to Dismiss the Obstruction Count.

On November 9, 2022, following a bench trial with stipulated facts, this Court convicted Mr. Gundersen of the Obstruction count and the Assault count. The government dismissed the remaining counts at the Sentencing Hearing. On July 25, 2023, Mr. Gundersen was sentenced to an aggregate term of 18 months' imprisonment (18 months on Count 1 and 18 months on Count 2 to run concurrently) followed by 36 months of supervised release. The Court sentenced Mr. Gundersen after applying the grouping Guidelines, which required the count with the highest offense level – which, under U.S.S.G. § 2J1.2(a) was the § 1512 obstruction count – to

be grouped with the § 111 assault count to arrive at a total offense level of level of 19. With acceptance of responsibility and no criminal history points, the Court concluded Mr. Gundersen's offense level was 16 and his guideline range was 21 to 27 months. In contrast, his guideline range for the § 111(a) offense alone (Base Offense Level 11) would have been 8 to 14 months.

On April 7, 2023, the D.C. Circuit decided *Fischer*, adopting a "broad interpretation" of Section 1512(c)(2) that "encompass[es] all forms of obstructive acts[,]" not just those related to a "record, document, or other object" as mentioned in Section 1512(c)(1). *United States v. Fischer*, 64 F.4th 329, 337 (D.C. Cir. 2023), cert. granted, No. 23-5572, 2023 WL 8605748 (U.S. Dec. 13, 2023).

At the Sentencing Hearing, the Court ordered Mr. Gundersen to self-surrender to the Bureau of Prisons. Mr. Gundersen received the order to surrender himself to FCI Loretto and he complied. Mr. Gundersen is currently incarcerated.

On December 13, 2023, the Supreme Court granted certiorari in *Fischer*, which presented the following question: "Did the D.C. Circuit err in construing 18 U.S.C. § 1512(c) ("Witness, Victim, or Informant Tampering"), which prohibits obstruction of congressional inquiries and investigations, to include acts unrelated to investigations and evidence?" *Id.*

Grounds for Release Pending Appeal

A court "shall order the release" of an individual pending appeal if it finds:

> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –
> (i) reversal,
> (ii) an order for a new trial,
> (iii) a sentence that does not include a term of imprisonment, or
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1); *see also United States v. Perholtz*, 836 F.2d 554, 555, 557 (D.C. Cir. 1987). In light of Mr. Gundersen's compliance on pretrial release, his timely self-surrender and the Supreme Court's decision to hear *Fischer*, Mr. Gundersen meets all of the statutory criteria for release pending appeal.

A. Mr. Gundersen poses no flight or safety risk.

Mr. Gundersen's behavior since the inception of this case has demonstrated by clear and convincing evidence that he will not flee and is not a safety risk. From January 27, 2021, until the day he reported to prison, Mr. Gundersen was released on conditions and a personal recognizance bond. Thus, for over two and a half years, Mr. Gundersen fully demonstrated his compliance with all pretrial release conditions. The Court and the government have inherently acknowledged that fact – Mr. Gundersen was allowed to remain the community both after he was found guilty and also after he was sentenced.

As the Court is aware, prior to his current incarceration, Mr. Gundersen was receiving treatment for his various mental health issues. His ties to the community, his active participation in his correctional treatment, and his proven willingness to follow the Court's orders underscores that he will neither flee nor pose a safety concern. For these reasons, as this Court previously found in the context of Mr. Gundersen's request to self-surrender, he presents no flight or safety risk. There are no new circumstances that would alter this assessment.

B. Mr. Gundersen's appeal raises a substantial question and therefore is not for the purpose of delay.

Whether Section 1512(c)(2) applies to Mr. Gundersen's conduct is a substantial question of law. Judges on both the District Court and the Circuit panel were of different opinions as to the constitutionality of the statute. Now, the Supreme Court has granted certiorari in *Fischer* to address whether Section 1512(c) includes conduct (like Mr. Gundersen's) that is unrelated to investigations and evidence.

A "substantial question" within the meaning of § 3143(b) is "'a close question or one that very well could be decided the other way.'" *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam) (quoting *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985)). This standard does not require the Court to find that Mr. Gundersen's appeal establishes a likelihood of *reversal*. *See Bayko*, 774 F.2d at 522-23. Rather, the Court must "evaluate the difficulty of the question" on appeal, and grant release pending appeal if it determines that the question is a close one or one that "'very well *could* be'" decided in the defendant's favor. *United States v. Shoffner,*

791 F.2d 586, 589 (7th Cir. 1986) (quoting *United States v. Giancola,* 754 F.2d 898, 901 (11th Cir.1985)). The grant of certiorari is strong evidence of the substantiality of an issue Mr. Gundersen has pressed since the inception of his case.

As the Court is aware, Mr. Gundersen challenged the legal propriety of the felony obstruction count, 18 U.S.C. § 1512(c)(2), in this case. Mr. Gundersen made three arguments supporting dismissal of this count. First, the statutory language, legislative history, and legal precedent reflect that § 1512(c)(2) prohibits only the corrupt obstruction of tribunal-like proceedings before Congress related to the administration of justice, not a proceeding like the certification of the electoral college vote. Second, the conduct Mr. Gundersen was accused of committing cannot qualify as conduct that "otherwise obstructs, influences, or impedes" an official proceeding, as § 1512(c)(2) is limited by § 1512(c)(1). As such, subsection (c)(2) prohibits only conduct that undermines an official proceeding's truth-finding function through actions impairing the integrity and availability of evidence. Third, as charged, § 1512(c)(2) does not provide fair notice that "official proceedings" includes proceedings unrelated to the administration of justice, and the statute's *mens rea* requirement—that the criminal act be committed "corruptly"—lacks a limiting principle, rendering the statute unconstitutionally vague as applied to Mr. Gundersen. [ECF. No. 37].

At least one other district judge has previously agreed that these are "close question[s] or one[s] that very well could be decided the other way." *United States v. Kevin Seefried*¸ 21-cr-287 (TNM), ECF No. 151 (citing *Perholtz*, 836 F.2d at 555; *see*

Order on Motion for Release Pending Appeal). Indeed, substantiality is not hypothetical here: the Supreme Court has granted certiorari to assess whether the D.C. Circuit erred in adopting a broad reading of 18 U.S.C. § 1512(c) "to include acts unrelated to investigations and evidence." *See* Petition for Certiorari, *Fischer v. United States*, No. 23-5572 (filed September 11, 2023).

C. Resolution of this substantial question in Mr. Gundersen's favor would likely result in a reduced imprisonment sentence that would expire before the appeal concludes.

If decided in Mr. Gundersen's favor, his appellate challenge to the applicability of Section 1512(c)(2) would likely result in a reduced imprisonment sentence that would expire before his appeal concludes. Mr. Gundersen's eighteen-month sentence is driven by the § 1512(c)(2) count. (ECF 151) Although Mr. Gundersen was also sentenced concurrently to eighteen months on the § 111(a) assault charge, the assault in this case was largely based on his alleged efforts to obstruct, impede, and influence an official proceeding under § 1512(c)(2). This is demonstrated by application of U.S.S.G. § 2J1.2(a) for the 1512 offense under the grouping Guidelines because it produced the highest offense level.

The Court expressed a desire to vary downward from the guideline range and an eighteen-month sentence would have represented a substantial upward variance if Mr. Gundersen had been sentenced on the assault count alone. The Court found that application of § 2J1.2(a) resulted in an offense level of 19. Deducting three points for acceptance of responsibility and applying Mr. Gundersen's Criminal History score

of I, the Court determined that Mr. Gundersen's guideline range was 21 to 27 months. Tr. 7/25/23, Sentencing Hearing at 6-8. The Court sentenced him to 18 months applying a "modest variance." But without the 1512 offense, the Court's application of U.S.S.G. § 2A2.4, would have led to the conclusion that the assault charge had a "base offense level of 10." Tr. 7/25/23, Sentencing Hearing at 11. Applying the 3 level enhancement for physical contact under § 2A2.4 would result in an offense level of 13, and 11 after credit for acceptance of responsibility.[1] Mr. Gundersen's guideline range would thus be 8 to 14 months on the assault count alone.

As an initial point, under the sentencing-package doctrine, the assault sentence would be vacated upon the reversal of the felony obstruction conviction. "This result rests on the interdependence of the different segments of the sentence, such that removal of the sentence on one count draws into question the correctness of the initial aggregate minus the severed element." *United States v. Smith*, 467 F.3d 785, 789 (D.C. Cir. 2006). Moreover, without Mr. Gundersen's obstruction conviction, his assault sentence likely would have been significantly lower. Mr. Gundersen's assaultive conduct – a jump into a riot shield that lasted no longer than a second – would have resulted in lower guideline range and would surely have resulted in a much different sentence, particularly as the Court announced an intention to vary downward.

[1] The Court initially said that it was applying the Official Victim Enhancement which would add 6 levels under 3A1.2. Tr. 7/25/23, Sentencing Hearing at 12. The Court then corrected itself because the official victim enhancement applies to 111(b) offenses but not 111(a). U.S.S.G. 2A2.2, Application Note 4.

A favorable resolution of the substantial question raised by Mr. Gundersen is very likely to result in a sentence less than the total of the time he will have already served given the expected duration of the appeal process. Mr. Gundersen's sentence on his assault count, with a guideline range of 8 to 14 months, likely would have been significantly lower than the sentence he received and may well have been for probation or home incarceration. Mr. Gundersen has already served over a month of imprisonment. The current median time interval from the filing of a notice of appeal to disposition in the D.C. Circuit is 11.3 months.[2] Given that the D.C. Circuit will likely hold Mr. Gundersen's case in abeyance pending the Supreme Court's decision in *Fischer*, even if nothing else changes, Mr. Gundersen's sentence absent the obstruction count will likely be less than the expected duration of the appeal process plus the total time he has already served. And if *Fischer* is decided favorably before the end of the Supreme Court's term and results in an immediate remand of Mr. Gundersen's case, it is likely the most probable sentence for his assault count will have been served before his appeal concludes.

Conclusion

For these reasons, Mr. Gundersen respectfully moves for release pending appeal.

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[2] U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2021 (Table B-4), *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2021.pdf.

Respectfully Submitted,

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